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No. 85-9

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in deciding if a bus line may be discontinued under 49 U.S.C. 10935(e)(1)(A), the Interstate Commerce Commission may consider the evidentiary criteria in 49 U.S.C. 10935(g)(1) and (2) in both its "public interest" and "unreasonable burden" determinations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 756 F.2d 419. The decision of the Interstate Commerce Commission (ICC) (Pet. App. C1-C26) is unreported. A subsequent (February 28, 1984) decision of the ICC denying Texas's request for an administrative stay of the ICC's decision pending review in the court of appeals is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on April 4, 1985. The petition for a writ of certiorari was filed on July 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the Interstate Commerce Commission's grant of the request by Greyhound Lines, Inc. (Greyhound), for permission to discontinue bus service to a series of points in Texas.

1. In Section 16(a) of the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 10935, Congress authorized the Interstate Commerce Commission (ICC) to preempt state regulation of certain bus carrier requests to discontinue intrastate bus services. Congress was concerned that state regulation had contributed to the inadequate performance of the bus industry in recent years and believed, in particular, that state regulation often created impediments that prevented interstate carriers from abandoning unproductive routes. S. Rep. 97-411, 97th Cong., 2d Sess. 7-11, 25-27 (1982); H.R. Rep. 97-334, 97th Cong., 1st Sess. 24-27 (1981); see *Humphrey* v. *United States*, 745 F.2d 1166, 1168 (8th Cir. 1984).

To remedy the burdensome effect of state regulation, Section 10935 gives the Commission final authority over interstate carriers' requests to discontinue intrastate bus service.[1] That provision limits state authority to review the exit petitions of interstate carriers providing intrastate transportation to a 120-day period. The ICC obtains jurisdiction if the state denies the request (in whole or in part) or fails to decide the request within 120 days. 49 U.S.C. 10935(a). Once the Commission obtains jurisdiction, it "shall" grant the request for discontinuance unless a timely objection is filed and the objecting party proves that discontinuance of the service "is not consistent with the public

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[1]Before the Bus Act reforms, states had full authority to regulate the commencement and discontinuance of intrastate bus service by interstate carriers. States retain full authority over exit petitions from bus carriers owned or controlled by a state or local government and from solely intrastate carriers.

interest or that continuing the transportation * * * will not constitute an unreasonable burden on interstate commerce." *Id.* at 10935(e)(1)(A).[2]

The terms "public interest" and "unreasonable burden on interstate commerce" are not defined in Subsection (e)(1). Congress, however, specified certain factors the ICC must consider in deciding whether to allow intrastate service to end. First, 49 U.S.C. 10935(g)(1) provides that in making a finding under Subsection (e)(1) the Commission "shall accord great weight" to the extent to which the revenues exceed the variable costs of providing the service. Second, 49 U.S.C. 10935(g)(2) directs the ICC to "consider, to the extent applicable, at least": "the national transportation policy" set forth in *id.* at 10101; whether the carrier has received an offer of financial assistance from a responsible person (including a governmental authority) to subsidize the service; and whether the carrier discontinuing service is the last one to provide it and whether reasonable alternative service is available.

The dispute in this case is over whether the statutory evidentiary factors discussed in the preceding paragraph are relevant under both the "unreasonable burden" and "public interest" tests.

2. Greyhound decided it wished to discontinue intrastate service over one of its interstate routes between Houston and San Antonio and to 46 off-route points served by nine other interstate routes in Texas. In May 1983, the Railroad Commission of Texas (RCT) denied Greyhound's request entirely (Pet. App. C3). Greyhound's subsequent appeal for a rehearing was denied that June (*ibid.*).

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[2]This standard applies to any intrastate service on an interstate route for which the carrier received operating authority on or before August 1, 1982 (49 U.S.C. 10935(e)(1)(B))—that is, before the reforms of the Bus Act. All of the routes at issue precede that date.

Greyhound then appealed the RCT decision to the ICC. After considering the evidentiary record before the RCT, the RCT's decision, and the pleadings and evidence submitted to the Commission itself, the Commission decided that Greyhound should be allowed to discontinue service at all points on the Houston-San Antonio route and at 26 of the 46 off-route points (Pet. App. A1, C13-C26). In reaching this decision, the ICC made distinct and separate findings under both the "unreasonable burden" and "public interest" tests (see, *e.g.*, *id.* at C16).

The Commission first examined the interstate burden imposed by this service. It considered Greyhound's evidence that the Houston-San Antonio route was unprofitable[3] and that ridership levels to all the points involved were low (Pet. App. C5-C8, C14-C16, C[illegible]-C20). RCT challenged Greyhound's cost and revenue data, but did "not present[] any evidence of its own" to support a finding that continued service at these points would not constitute an unreasonable burden (*id.* at C16). On the record before it, the Commission concluded that the RCT had failed to carry its burden of proving that Greyhound's service would not constitute an unreasonable burden on interstate commerce (Pet. App. C16, C20).

The Commission then turned to the public interest test (Pet. App. C16, C20). It considered the public testimony of need for bus service, the availability of alternative bus service in the affected communities, the unprofitability of

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[3] Greyhound offered variable cost and revenue calculations for the Houston-San Antonio route which it claimed established that revenues for that route were 10 percent below its variable costs. Due to errors in the calculations, the net effect of which was "probably rather small," the Commission could not be certain that Greyhound's revenues actually were below the variable costs of service (Pet. App. C15-C16). Nevertheless, the agency was convinced that Greyhound's revenues were below full cost, so that the services were unprofitable (Pet. App. C19).

Greyhound's service to these points,[4] and the absence of a subsidy offer (*id.* at C16-C19, C20-C22). The Commission's decision ultimately hinged on the availability of reasonable alternative service. The Commission granted Greyhound's petition to discontinue service only to those points that either had no riders or would have alternative service (*id.* at C19, C20-C22).

The petitioner, on behalf of the RCT, then sought judicial review in the United States Court of Appeals for the Fifth Circuit.

3. The court of appeals upheld the Commission's decision in all respects (Pet. App. A1-A16). The court rejected petitioner's principal argument that revenue and cost evidence submitted under Subsection (g)(1) may be considered only for the unreasonable burden test, and that the Subsection (g)(2) factors apply only to the public interest test. Instead, the court upheld the Commission's interpretation that, while the public interest and unreasonable burden

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[4]The Commission examined the public interest impact of unprofitability in terms of the national transportation policy (NTP) (see 49 U.S.C. 10101(a)(2)). As the Commission explained, the NTP articulates policy goals of, inter alia, allowing the most productive use of equipment and energy resources, enabling efficient and well-managed carriers to earn adequate profits and attract capital, and improving and maintaining a competitive, privately-owned motor carrier system (Pet. App. C17-C19). The Commission reasoned that to the extent Greyhound's unprofitability jeopardized its ability to provide service on its other routes or forced passengers on profitable routes to subsidize the service at issue by paying higher rates, Greyhound's unprofitability had a public interest impact that properly could be considered under the public interest test; it also pointed out that having services profitably provided by the smaller carrier stepping into Greyhound's shoes here would "permit the various goals of the National Transportation Policy to be met simultaneously. Service would be maintained, the burden on interstate commerce would be ended, a variety of services would be provided which would be appropriate to the demands and requirements of this particular market, and equipment and energy resources would be used more productively and efficiently" (Pet. App. C18).

tests are distinct, the evidence outlined in Subsections (g)(1) and (g)(2) may be relevant to both tests. Although the court viewed both the statute's language and its legislative history as ambiguous, it concluded that the Commission's interpretation was a permissible one (Pet. App. A8-A13).

More specifically, the court noted that the statutory language does not "require that exclusive weight be given" to the variable costs factor under the "public interest" or "interstate burden" inquiries (Pet. App. A8). The court observed (*ibid.*) that instead Subsection (g)(1) provides that "the Commission 'shall accord *great weight*' (only) to the variable costs factor in making a finding under (e)(1) — which finding would include application of both tests ('public interest' and 'interstate burden')" (emphasis in original; citation omitted). Similarly, the court found that Subsection (g)(2) "provides that '[i]n making *a* finding' under [Subsection (e)(1)] * * *, the Commission shall consider the national transportation policy, the offer or receipt of a subsidy, and the availability of alternative services" (*ibid.*) (emphasis in original; footnote omitted).

Given the reasonableness of the Commission's interpretation of the statutory language, the court of appeals questioned whether consideration of the legislative history was even appropriate in light of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7 (Pet. App. A9-A11). Nonetheless, turning to the legislative history arguendo, the court noted that under the House version of the Act, which was ultimately adopted in Subsection (e)(1), the Commission could reasonably infer that it is required to consider all of the current Subsection (g)(1) and (g)(2) factors under both the unreasonable burden and public interest tests (Pet. App. A11-A13). The court also concluded that, "[c]ontrary to what Texas suggests, the distinction between the burden of proof under (e)(1)(A) and the burden

of proof under (e)(2)(A) is not eliminated under the Commission's construction," since an objecting party who failed to prove that revenues exceed variable costs automatically loses under the latter, but not the former (*id.* at A13). The court concluded that the Commission's interpretation of the statute was a reasonable one in light of the statute's legislative history, as well as its language (*ibid.*).[5]

ARGUMENT

The opinion of the court of appeals correctly affirmed the Interstate Commerce Commission's interpretation of the Bus Act. The holding is consistent with the statute and with the decisions of three other courts of appeals that have reviewed ICC exit decisions under the Bus Act; it does not conflict with any decision of this Court or any other court. Moreover, the petition raises no issues of general importance. Further review by this Court is not merited.

1. Petitioner's principal contention is that the court of appeals' decision eliminated any distinction between the unreasonable burden and public interest tests by allowing the Commission to consider some of the same evidentiary factors under both tests.[6] Petitioner maintains that the only way to preserve the statutory mandate for separate tests is

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[5]The court of appeals also rejected petitioner's other arguments, holding that the Commission's decision did not deny petitioner due process; that it was supported by substantial evidence and was not arbitrary or capricious; and that the Bus Act is not unconstitutionally vague (Pet. App. A13-A16). Petitioner does not press these arguments to this Court.

[6]The petitioner continually mischaracterizes the position taken by the Commission and the court of appeals. Both clearly acknowledged that Subsection (e)(1) contains two separate and distinct tests. They simply rejected the argument advanced by petitioner here that the unreasonable burden test is limited to a simple comparison of revenues and variable costs and that the public interest test cannot include economic considerations.

to ensure that completely different evidentiary factors apply to each test. Thus, petitioner argues, the Commission may consider only the Subsection (g)(1) revenue and variable cost data under the unreasonable burden test (Pet. 5), and may consider the Subsection (g)(2) factors only under the public interest test (Pet. 7, 8). Petitioner's argument is logically and legally deficient.

The court of appeals was correct that the Commission's construction of this broad-textured statute should be deferred to so long as it is a reasonable one, *Chevron, supra*, slip op. 4-7. On its face, the statute does not restrict the Commission's consideration of the Subsection (g)(1) and (g)(2) evidentiary factors to one test or the other. It would have been a simple matter for the statute to have provided that Subsection (g)(1) controlled the undue burden determination and Subsection (g)(2) the public interest determination, but Congress did not write it that way. The legislative history, if ambiguous, nonetheless includes ample support for the Commission's approach, as the court of appeals concluded (Pet. App. A10-A13). The District of Columbia Circuit agreed, finding that "Representative Clausen's description of the conference bill [ultimately passed] lends support to [the Commission's] interpretation:

> The conference substitute also provides that in making its public interest and burden-on-commerce determinations, with respect to reduction or continuance of existing service, the Commission shall give great weight to the extent to which the revenues derived from the service in question are less than the variable costs of providing the service.

128 Cong. Rec. H6695 (daily ed. Aug. 19, 1982)." *Pennsylvania Public Utility Commission* v. *United States*, 749 F.2d 841, 851 (D.C. Cir. 1984).

The construction of the statute upheld here fully comports with the decisions of the other circuits that have reviewed cases decided under Section 10935(e)(1). No court has held that all the Subsection (g)(2) evidentiary factors are relevant only under the public interest test. Moreover, two other courts of appeals have specifically rejected petitioner's argument that Subsection (g)(1) applies solely to the unreasonable burden test. *Pennsylvania Public Utility Commission* v. *United States*, 749 F.2d at 847-853 (ICC may consider variable cost factor in making both of the required findings)[7]; *Auville* v. *ICC*, 747 F.2d 179, 185 (4th Cir. 1984) (Subsection (g)(1) makes financial loss a factor in each of the two Subsection (e)(1)(A) determinations). See also *Humphrey* v. *United States*, 745 F.2d 1166 (8th Cir. 1984) (upholding a Commission decision that apparently weighed unprofitability under both tests).

The Commission's decision in this case illustrates the fallacy of petitioner's claim that the ICC's interpretation of the statute eliminates any distinction between the two tests. If only the unreasonable burden test had been applied, the Commission would have authorized discontinuance to *all* off-route points, since the RCT had not shown that service at these points would not unreasonably burden interstate commerce. But, by applying the public interest test, the Commission denied discontinuance for the 20 active points that would have no alternative service. Even though some of the same evidence may be considered under both tests, the Commission's evaluation and use of the evidence is demonstrably not for the same purpose. There is no reason to suppose that the Commission is incapable of deciding how a datum relates to the presence of public interest, on the one hand, and how it relates to an undue burden on interstate commerce, on the other.

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[7]The purported "conflict" between *Pennsylvania* and this case is discussed in greater detail at pages 11-12, *infra*.

Economic impacts simply cannot be divorced from, and ignored in, a public interest analysis. For example, the statutory "national transportation policy" (which petitioner concedes is applicable under the public interest test) directs the Commission to economic, as well as other, considerations. Specifically, under 49 U.S.C. 10101(a)(2)(C), (D), and (G), pertinent public interest concerns include whether the service sought to be discontinued represents a productive use of the carrier's equipment and resources, the carrier's ability to generate adequate revenues, and the maintenance of a "sound, safe, and competitive privately owned motor carrier system." Similarly, evidence that the carrier has been offered a subsidy (Subsection (g)(2)(B)) is an indicium of the public's interest in maintaining service, as petitioner would concede, but it is also clearly a relevant consideration in determining whether continued operation will actually burden interstate commerce. The Commission should be able to consider it in both instances. And, again, if there is to be a presumption ("great weight") in favor of discontinuance when a carrier demonstrates that variable costs substantially exceed revenues—see H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 49-50 (1982); 128 Cong. Rec. H6694-H6695 (daily ed. Aug. 19, 1982) (statement of Rep. Clausen); *Pennsylvania, supra*, 749 F.2d at 847-848—then Subsection (g)(1), at least, will necessarily have to be considered in both determinations.

Finally, contrary to the petition's assertion (at 7-8), the Commission's construction of the Act does not eliminate the distinction between the pre- and post-August 1982 bus exit standards. As the court of appeals explained, under Subsection (e)(2)(A) (which governs post-August 1982 routes), if the carrier's revenues are less than its variable costs, the Commission cannot disapprove the discontinuance. In contrast, under Subsection (e)(1)(A) (pre-August 1982 routes), the objecting party might still prevail since the

Commission need only accord "great weight," not conclusive weight, to the revenues/variable cost showing. See Pet. App. A13; see also *Humphrey* v. *United States*, 745 F.2d at 1169 n.4.

Thus, the court of appeals properly held that the Commission's interpretation of the Bus Act—that the evidentiary factors in Subsections (g)(1) and (g)(2) are relevant to both tests—was reasonable.

2. Petitioner mischaracterizes the decisions of both the Fifth Circuit and the District of Columbia Circuit in an attempt to create a conflict between them.[8]

In *Pennsylvania*, the District of Columbia Circuit held that (1) the ICC may accord the fact that variable costs exceed revenues "great weight" in its public interest and its unreasonable burden findings, but that (2) the public interest and unreasonable burden determinations themselves may not be balanced against one another, but must each be considered separately. Thus, with regard to the first holding, the opinion specifically rejects petitioner's argument that the Subsection (g)(1) criterion may be applied only to the unreasonable burden determination (compare Pet. 5 with 749 F.2d at 850-851, 853). With regard to the second, *Pennsylvania* has no relevance to the Fifth Circuit's decision: the Commission in the instant case did not balance the public interest and unreasonable burden determinations against one another, but made separate and distinct determinations for each,[9] entirely consistently with the District

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[8]Unfortunately, the court of appeals accepted petitioner's mischaracterization of the decision in *Pennsylvania, supra*, as construing the statute differently from the former's decision (Pet. App. A2). As explained in the text, *infra*, it does not.

[9]Petitioner at one point concedes as much: "The ICC found that the RCT had failed to prove that discontinuance of service was inconsistent with the public interest or that continuance of service did not constitute an unreasonable burden on interstate commerce * * *" (Pet. 4). This belies its assertion later (*id.* at 9) that somehow the Commission did not

of Columbia Circuit's schema (compare, *e.g.*, Pet. App. C16 with 749 F.2d at 853).

3. Finally, the issue raised by this petition is of small and diminishing interest. The part of the Bus Act at issue applies to only a limited class of bus discontinuance requests: those by an interstate carrier to end intrastate service that was authorized before August 1, 1982 (49 U:S.C. 10935 (e)(1)(B)), where the ICC has overruled the state agency's denial. There is not likely to be a significant amount of future litigation involving this limited class, nor is the ruling here likely to be applicable to cases not in this class. In any event, only a handful of bus exit requests have been challenged in court and we know of only one exit case now in the courts which remotely might involve these issues.[10] Thus, there is no need for this Court to address the statutory provisions upon which this petition is based.

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make a determination as to unreasonable burden. Whatever the petition states, the Commission did find that petitioner had failed to demonstrate that continuing the line would not constitute an unreasonable burden on interstate commerce (Pet. App. C16, C20).

[10] *Public Service Commission* v. *ICC*, No. 85-1620 (4th Cir. filed June 24, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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